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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDDIE GENE MENDONCA, Defendant and Appellant.	A123615 (Sonoma County Super. Ct. Nos. SCR466884 & SCR530960)

Appellant appeals from judgment and sentencing in Sonoma County Superior Court case numbers SCR466884 and SCR530960 with a certificate of probable cause. On appeal, he claims he received ineffective assistance of counsel below because counsel failed to raise or present a defense available to appellant under California's Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5[1]) (Compassionate Use Act). We disagree, and affirm.

FACTUAL AND PROCEDURAL HISTORIES

A five-count criminal complaint was filed in case number SCR466844 by the Sonoma County District Attorney's Office on July 5, 2005, charging appellant with separate counts of possession and transportation of methamphetamine (§§ 11378, 11379, subd. (a)), possession and transportation of marijuana (§§ 11359, 11360, subd. (a)), and one count of illegal possession of ammunition (Pen. Code, § 12316, subd. (b)(1)).

[1] All further undesignated statutory references are to the Health and Safety Code.

Appellant subsequently entered an "open" plea of guilty to the possession of methamphetamine count for which he was sentenced to three years in state prison, the execution of which was suspended subject to appellant's successful completion of three years of formal probation. In return, the rest of the charges were dismissed in the interest of justice.

Approximately one year later, in August 2006, probation was revoked after appellant admitted a violation by virtue of his use of methamphetamine on July 18, 2006. His attorney admitted that appellant "relapse[d]," noted this was his first probation violation, and requested that probation be reinstated. After appellant agreed to waive any custody/treatment credits, the court reinstated probation.

On February 25, 2008, another criminal complaint was filed against appellant in case number SCR530960, charging eight counts including separate counts of possession for sale, and transportation of marijuana (§§ 11359, 11360, subd. (a)), possession, possession for sale and transportation of Vicodin (Health & Saf. Code, §§ 11350, subd. (a), 11351, 11352, subd. (a)). The complaint also charged the possession and use of a false compartment, within the meaning of section 11366.8, subdivision (a), and misdemeanor counts of possession of more than one ounce of marijuana and possession of a hypodermic needle and syringe.

After a series of continuances to facilitate discussions between the prosecution and defense concerning a possible disposition, on October 9, 2008, a disposition was reached encompassing both cases. As to case number SCR466844, it was agreed that probation would be terminated and appellant would be sentenced to serve the previously imposed term of three years in state prison. As to case number SCR530960, appellant pleaded no contest to count one (possession of marijuana for sale), and count six (use of a false compartment). It was agreed that appellant would be sentenced to a consecutive term of eight months as to each count, which, together with the three year sentence in case number SCR466844, would result in appellant receiving an aggregate state prison term of four years four months.

Appellant in propria persona applied for a certificate of probable cause as to both cases, claiming his attorney provided ineffective assistance of counsel by failing to raise a defense under the Compassionate Use Act. The trial court granted the request, and this timely appeal followed.

LEGAL DISCUSSION

On appeal, appellant claims that he received ineffective assistance of counsel because his counsel failed to raise and present a defense available to appellant under the Compassionate Use Act.

To establish entitlement to relief based upon a claim of ineffective assistance of counsel the burden is on appellant to show "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *Strickland v. Washington* (1984) 466 U.S. 668.)

Where the record on appeal "sheds no light" on why counsel acted or failed to act in the manner challenged, a judgment is generally affirmed unless there simply could be "no satisfactory explanation" for counsel's actions. (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) Where the record does not illuminate the basis for a challenged act or omission, a defendant's claim of ineffective assistance of counsel is more appropriately made in a petition for habeas corpus where there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner challenged. (*Ibid.*)

Section 11362.5, known by its popular name, the Compassionate Use Act, provides immunity from criminal prosecution for the possession and cultivation of marijuana in California for persons possessing a medical care provider's authorization. In part, the section provides in relevant part: "(d) [Health and Safety Code] Section 11357, relating to the possession of marijuana, and [Health and Safety Code] Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a

patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)

The law of immunity was expanded several years later with the enactment of section 11362.765 to cover criminal liability based "sole[ly]" on the defendant's status as a compassionate user of marijuana for, among other crimes, the possession of marijuana for sale. (§ 11359.) However, section 11362.765 cautions that "nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit." (§ 11362.765, subd. (a).)

Appellant points to this statutory immunity and states that counsel's performance was ineffective because, despite counsel's knowledge of appellant's status as a licensed user of medical marijuana, "defense counsel only mentioned [appellant's] status . . . on one occasion, when it was promptly rejected by the District Attorney."

We disagree that the record sufficiently supports appellant's contention on appeal that his trial counsel failed to raise the medical marijuana statute as a defense. First, we note that the source of this factual contention is the self-serving declaration of appellant himself filed in support of his request for a certificate of probable cause. Generally, self-serving declarations lack trustworthiness. (*People v. Duarte* (2000) 24 Cal.4th 603, 611.) In this case, appellant's comment is completely uncorroborated by anything in the record.

Equally important, appellant's statement included the following explanation, allegedly offered by the prosecution in refusing to consider a medical marijuana defense: "[T]he District Attorney rejected the Defendants [*sic*] Medical Marijuana Status because the Defendant had multiple bags of marijuana and a prior conviction for possession of marijuana for sales." Indeed, even assuming the trustworthiness of appellant's statement, it refutes his contention on appeal that a medical marijuana defense was not raised by trial counsel. It was. It is just that the prosecutor was unimpressed by its strength, exemplified by the prosecutor pointing out that the amount of marijuana found in appellant's possession, when coupled with appellant's prior criminal history, made it

likely that the prosecution would be able to prove that appellant possessed the marijuana for sale, "for profit." (§ 11362.765, subd. (a).) The prosecution was certainly justified in its belief particularly in light of a probation department report noting that appellant possessed more than 128 grams of marijuana packaged in nine separate baggies, which was found secreted in a hidden compartment in his vehicle along with other drugs, two hypodermic needles, three working cellular phones, and $270 in cash.

Perhaps even more importantly, the charges brought against appellant relating to marijuana possession were largely irrelevant to the dispositions in both of appellant's cases. In case number SCR466844, appellant pleaded guilty to possession of *methamphetamine*, for which he received a sentence by the court of three years in state prison. In case number SCR530960, appellant was charged with eight counts, only two of which related to marijuana at all. In return for the dismissal of six counts, appellant pleaded no contest to possession of marijuana *for sale*, and use of a false compartment. He received an additional 16 months in prison for these offenses. Thus, of the three offenses to which appellant pleaded the functional equivalent of guilty, only one related to marijuana, and that charge was not subject to immunity under section 11362.765 if it was proved at trial.

In summary, we find insufficient evidence that defense counsel's performance fell below the standard of care, or that it resulted in any prejudice to appellant. Finally, on the issue of prejudice, given the diversity of the eight charges appellant faced in case SCR530960, it is abundantly clear that even if a Compassionate Use Act defense had been argued with greater vigor, it is not reasonably likely that appellant would have been offered a disposition in the latter case which would have netted him less than 16 months in state prison, or that he would have achieved a better result by going to trial, given the strength of the case against him.[2]

[2] We also disagree with appellant's characterization that he was "forced" to plead no contest to the possession for sale count in case number SCR530960. The disposition offered appellant was very reasonable given the constellation of charges he faced in that case, and it is clear from the record that his plea was voluntary and freely made.

DISPOSITION

The judgments and sentences in both case numbers SCR466844 and SCR530960 are affirmed.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

_____
RIVERA, J.